U.S. Department of Labor

Office of Administrative Law Judges
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Issue date: 27Jul2001

CASE No.: 2000-BLA-00368

In the Matter of:

ANDREW FUTCHKO
Claimant

v.

C.L.S. COAL COMPANY
Employer

and

LACKAWANNA CASUALTY COMPANY
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-in-Interest

Appearances:

Maureen Hogan Krueger, Esq.
For the Claimant

A. Judd Woytek, Esq.
For the Employer

Before: Ainsworth H. Brown
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS

This proceeding arises from a claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §

901 et seq (the Act). The Act provides benefits to persons totally disabled due to pneumoconiosis and to certain survivors of persons who had pneumoconiosis and were totally disabled at the time of their death or whose death was caused by pneumoconiosis. Pneumoconiosis is a chronic dust disease of the lungs, including respiratory and pulmonary impairments arising out of coal mine employment, and is commonly referred to as black lung.

On January 13, 2000, the Director, Office of Workers' Compensation Programs, referred this case to the Office of Administrative Law Judges for a formal hearing. DX -71. A hearing was held before me in Reading, Pennsylvania on March 30, 2001, at which time all parties were given a full opportunity to present evidence and argument as provided in the Act and the Regulations issued thereunder, found at Title 20, Code of Federal Regulations.[1] At the hearing, Claimant's Exhibits 1-16; Director's Exhibits 1-72 and Employer's Exhibits 1-5 were admitted, with employer granted leave to submit two additional exhibits.[2]

ISSUES

The length of Claimant's of qualifying coal mine employment[3] was noted on the hearing referral sheet as 27 years, but is not marked as a contested issue. DX-71. In earlier documents, a length of 13.3 years is noted. DXs-20, 21. At the formal hearing, there was some confusion about whether this issue had been resolved by stipulation. *See* TR-10-11. Under the circumstances here, the issue of length of coal mine employment will be considered. The following are therefore at issue in this case:

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[1] On December 20, 2000, the Secretary of Labor adopted amendments to the Black Lung Regulations. Although the Amendments took effect on January 19, 2001, their application has been challenged, and, on February 9, 2001, the United States District Court for the District of Columbia enjoined the application of the Amendments "except where the adjudicator, after briefing by the parties to the pending claim, determines that the regulations at issue in the instant lawsuit will not affect the outcome of this case." *National Mining Ass'n. v. Chao*, No. 1:00CV03086 (EGS), slip op. 3 (D.D.C. Feb. 9, 2001). By Order, dated February 20, 2001, the undersigned directed the parties to demonstrate how the Amendments would affect the outcome of this claim. By letter, dated March 6, 2001, employer's counsel informed the undersigned that the parties have stipulated that the relevant Amended regulations would not affect the outcome of this claim. In a letter brief filed March 7th, the Director took a similar position. Having reviewed the record, the arguments on the merits of the claim and in response to the Order, it is determined that the application of the Amendments will not affect the outcome of this claim.

[2] The following references will be used herein: "TR" for transcript, "CX" for Claimant's exhibit, "DX" for Director's exhibit and "EX" for employer's exhibit.

[3] Because Mr. Futchko's last coal mine dust exposure occurred in the Commonwealth of Pennsylvania, *see* DX-2, this claim arises within the territorial jurisdiction of the United States Court of Appeals for the Third Circuit. *See Shupe v. Director, OWCP*, 12 BLR 1-200 (1989)(*en banc*).

(1) whether there is a claim that is subject to adjudication; if so
(2) the length of Claimant's coal mine employment;
(3) whether Claimant suffers from coal workers' pneumoconiosis;
(4) whether Claimant suffers from a totally disabling pulmonary or respiratory impairment;
(5) whether any total disability, if found, is due to pneumoconiosis; and
(6) whether Claimant has established a material change in conditions.

For the reasons stated herein, I find that there is a current claim, that Claimant has not established pneumoconiosis or total respiratory disability and thus has not proven a material change in conditions. Based on a review of the record as a whole, moreover, I also find that Claimant has failed to establish entitlement to benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background and Procedural History

Andrew Futchko, Claimant, was born on January 4, 1929. DX-3. He was married to Mary Herman on July 15, 1951, DX-4, and they remain together. *See* TR-12. She is Claimant's dependent for purposes of possible augmentation under the Act.

This claim has an extensive and convoluted procedural history. Claimant initially filed for benefits under the Act on May 18, 1990. DX-20. The claim was administratively denied on July 30, 1990, because Claimant failed to establish any element of entitlement. *Id*. Claimant requested modification on April 2, 1991, but on May 31st informed the district director that he did not wish to pursue modification. *Id*. On July 31, 1991, the district director denied modification based on Claimant's May 31, 1991 letter.[4] *Id*.

Claimant again filed for benefits on June 14, 1996. DX-1. This claim was administratively denied on October 22, 1996, DX-11, and referred to the Office of Administrative Law Judges for a formal hearing at Claimant's request. DX-21. A formal hearing was held before Administrative Law Judge Ralph J. Romano on July 22, 1997. DX-26. At this proceeding, Claimant was not present, but appeared through counsel, and the following exchange took place:

> Administrative Law Judge: ... we had a discussion before we went on the record relative to Mr. Futchko's withdrawal of his claim. Miss Koschoff?

[4] This action constitutes a final denial of the claim, and not a dismissal based on a voluntary withdrawal of the claim. *Compare* 20 C.F.R. § 725.306 *with* § 725.409.

> Ms. Koschoff: Mr. Futchko contacted me last evening and advised me that he no longer wishes to pursue his claim. I did discuss at length with him the situation and he asked me today to request that Your Honor issue an Order withdrawing his claim.
>
> Administrative Law Judge: All right, we'll do so.

DX-26. Pursuant to this, Judge Romano on July 31, 1997 issued an Order of Dismissal. DX-27.

On July 24, 1998, however, Claimant sought modification, alleging a change in conditions and mistake in determination of fact. DX-28. The OWCP responded to this correspondence on August 18, 1998, stating that "we will consider this correspondence as a request for modification[.]" The claims examiner advised Claimant that he could submit additional evidence. DX-29. The district director denied modification, issuing a "Proposed Decision and Order" on November 4, 1998. The Proposed Order states that Claimant "filed a timely request for modification" but denied modification on the merits. DX-35. The matter was then referred to the Office of Administrative Law Judges on February 8, 1999. DX-40.

On July 27, 1999, Administrative Law Judge Romano issued a Decision and Order -- Remanding Claim, and returned the claim to the Office of Workers' Compensation Programs. DX-52. Judge Romano observed that

> [o]n further consideration of the evidence of record, however, I note that this claim was dismissed on July 29, 1997 as a withdrawn claim at the request of Claimant. Under such circumstances, the regulations state that the claim will be considered not to have been filed. 20 C.F.R. 725.306(b). ... Thus, there is no claim to which the petition for modification may be addressed.
>
> The Claimant's submission of additional evidence subsequent to the erroneous request for modification indicates Claimant's interest in pursuing a claim for benefits. This matter will be remanded, therefore, to the District Director for further proceedings consistent with Claimant's demonstrated interest in pursuing a claim for benefits. Such a process, however, must commence with a filing of a new claim since the claim filed on June 14, 1996 is to be considered not to have been filed [*see* 20 C.F.R. § 725.306(b)] and modification of that claim, therefore, i[s] not available.

DX-52 at 2.

Pursuant to Judge Romano's remand Order, the Department of Labor treated Claimant's "interest in pursuing a claim for benefits" as a "newly filed claim," and offered Claimant a complete pulmonary examination. 30 U.S.C. § 923(b); *see Newman v. Director, OWCP*, 745 F.2d 1162, 7 BLR 2-25 (8th Cir. 1984). Claimant was directed to schedule this examination. DX-53. The OWCP notified employer of this claim, stating that "[i]n accordance with the Order of Remand ... we have received a claim for benefits[.]" DX-54. On October 4, 1999, this "claim" was administratively denied, DX-64, and, as noted above, this matter was referred to the Office of Administrative Law Judges on December 9, 1999. DX-71.

Whether there is a Claim subject to Adjudication

The initial question is whether there exists a perfected claim which is subject to adjudication. The Secretary's regulations provide that the filing of a signed statement indicating an intention to claim benefits may constitute a claim under certain circumstances. 20 C.F.R. § 725.305(a). Upon receiving such a written statement, the Department of Labor must notify the signer, in writing, that to be considered, the claim must be executed by the claimant on a prescribed form and filed with the Department of Labor within six months of the mailing of the notice. 20 C.F.R. § 725.305(b). The regulations further provide that claims that are not perfected by filing the prescribed form "*shall* not be processed." 20 C.F.R. §725.305(d) (emphasis added).

Administrative Law Judge Romano's Order remanding this matter to the OWCP provided that agency with an appropriate Section 725.305(a) notice of "Claimant's demonstrated interest in pursuing a claim for benefits" in the form of his request for modification. DX-52. The Department of Labor, however, failed to inform Claimant that he must perfect the claim by reducing his request for benefits to a "prescribed" format. Instead, the Department processed the request for modification as a new claim, either effectively ignoring the regulation's dictate that a supposedly deficient filing "shall not be processed,"[5] *see* 20 C.F.R. § 725.305(d), or waiving the requirement of a proper form.

Under the unique circumstances here,[6] I am unable to conclude that Claimant's failure to submit the prescribed form requires yet another remand for Claimant to fill in a Form CM-911. I find that Claimant's request for modification constitutes a claim that may be adjudicated at this time.

Length of Coal Mine Employment

Claimant has the burden of establishing the length of his qualifying coal mine employment, *Shelesky v. Director, OWCP*, 7 BLR 1-34 (1984). Credible lay evidence and affidavits may constitute sufficient proof of coal mine employment. *Justice v. Island Creek Coal Co*. 11 BLR 1-91 (1988); *see generally Migliorini v. Director, OWCP*, 898 F.2d 1292, 1294-95, 13 BLR 2-418 (7th Cir.), *cert. denied* 498 U.S. 958 (1990). The Act provides no established methodology for computing the length of a miner's coal

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[5] Section 422(e) of the Act provides

> (e) Conditions upon payment. No payment of benefits shall be required under this section:
> (1) except pursuant to a claim filed therefor in such manner, in such form, and containing such information, as the Secretary shall by regulation prescribe[.]

30 U.S.C. § 932(e).

[6] These circumstances were complicated by an apparent disagreement between Claimant and his former counsel. *See* Hearing Transcript [9/12/00].

mine employment, provided all relevant evidence on this issue is evaluated and adequate findings made.

Claimant has asserted a 27-year coal mine employment history. *See* DXs-1, 20; TR-9-11. I will credit Claimant with at least 24 years of qualifying coal mine work. Mr. Futchko submitted three employment history forms (Form CM-911a) with his first claim DX-20. In the first CM-911a, filed May 16, 1990, Claimant alleged three separate periods of coal mine work totaling 24 years. A second CM-911a was filed on June 18, 1990. DX-20. Coal mine employers were listed for the periods from May 1, 1947 until June 1, 1948, June 4, 1948 until May 1, 1960, 1961 through 1965, and then May 2, 1979 until April 5, 1986, for a total of 24 years. *Id*. A third CM-911a was signed on July 5, 1990. Claimant again asserted coal mine employment that accumulated 24 years, and specified which employers were coal mine operators: Dodds & McCarthy, ShenPenn, Beechwood Contracting, Penn Equipment and CLS. *Id*. A description of coal mine work was completed by Claimant on July 5, 1990. This document likewise chronicles 24 years of coal mine work. DX-20.

Claimant's Social Security Administration (SSA) earnings statement documents 41 qualifying -- earnings of at least $ 50 -- quarters of employment from 1949 until 1960 with employers claimed to be operators; a total of 10.25 years. DXs-2, 20. Nine additional quarters, 2.25 years, are listed for Beechwood and Reading Anthracite from 1962 through 1965. The balance of Claimant's employment during this interval was in highway construction. *Id*. While not broken into quarterly earnings, the SSA statement supports Mr. Futchko's claim of employment with Penn Equipment/CLS from 1979 until 1987. I will credit his statement that this latter employment amounted to eight years. Thus far Claimant has established approximately 20.5 years. I will also credit Claimant's statements and testimony that he started coal mine work in 1947, prior to any indication of coal mine work in the SSA statement. It is not unusual to have undocumented work in independent mines. This adds approximately 2.25 years to the total, for a preliminary total of at least 22.75 years.

Although I credit testimony of undocumented work not reflected in the SSA statement, *see generally Marx v. Director, OWCP,* 870 F.2d 114, 118-120, 12 BLR 2-199 (3d Cir. 1989), I am unable to credit Claimant with the six or seven years allegedly spent in coal mine trucking while he was employed between 1965 through 1978 in highway construction. Although undocumented employment may be credited, *id*., his highway work for this period is well-documented by SSA records *and* Claimant did not claim this in his 1990 statements. Also, while Claimant testified that he would spend half his time in construction and that he then hauling coal during the winter, *see* TR-16-17, I find that Mr. Futchko's sincere and truthful testimony regarding this period somewhat imprecise. I am satisfied that there is at least enough additional coal mine employment during this period to bring the total up to the 24 years Claimant has most consistently alleged. I note in passing that a number of physicians took work histories of approximately 20 to 24 years of coal mine employment when they examined Mr. Futchko.

Duplicate Claim

Because Claimant seeks benefits more than one year after the final denial of his initial [May 18, 1990] claim on July 31, 1991, *see* DX-20, this filing constitutes a duplicate claim. A duplicate claim must

be denied on the basis of the prior denial unless a claimant demonstrates that there has been a material change in conditions. 20 C.F.R. § 725.309(d).

In order to evaluate whether Claimant has demonstrated a material change in conditions, I will consider whether Claimant has established by a preponderance of the new evidence that was developed subsequent to the denial of the prior claim at least one of the elements of entitlement previously adjudicated against him. *Allen v. Mead Corp.*, BRB No. 99-0474 BLA, 22 BLR 1-___ (2000); *see Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 317, 20 BLR 2-76 (3d Cir. 1995); *Cline v. Westmoreland Coal Co.*, 21 BLR 1-69 (1997). If this threshold burden is met, Claimant is entitled to a full adjudication of his claim based on the record as a whole. *Id.* In this case, Claimant may demonstrate a material change in conditions by establishing the existence of pneumoconiosis or total disability due to pneumoconiosis, because the denial of his previous claim was based on a failure to establish any element of entitlement. DX-20.

Medical Evidence: X-Ray Evidence

Claimant may demonstrate the existence of pneumoconiosis on the basis of x-rays which are interpreted as positive for the disease under the classification standards set forth at 20 C.F.R. § 718.102(b) as category 1, 2, 3, A, B, or C, according to the ILO-U/C classification system. *See Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999)(*en banc* on recon.). A chest x-ray classified as category 0, including subcategories 0/1, 0/0, or 0/-, does not constitute evidence of pneumoconiosis. In reviewing the x-ray evidence, I must consider the qualifications of the medical experts.[7] *Id.*

For purposes of Section 718.202(a)(1), the record includes interpretations of numerous chest x-rays which have been classified according to the above criteria. By letter, dated April 10, 2001, the parties stipulated that the record will include the following x-ray interpretations.

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[7] The following are used to designate a physician's radiological credentials: "B," which denotes that the physician is a qualified "B-reader" of x-rays. "BCR" means that the physician is board-certified in radiology. A B-reader is a physician who has demonstrated proficiency in assessing and classifying x-ray evidence of pneumoconiosis by successful completion of an examination conducted by, or on behalf of, the Appalachian Laboratory for Occupational Safety and Health. *See* 20 C.F.R. § 718.202(a)(1)(ii)(E); 42 C.F.R. § 37.51; *see LaBelle Processing Co. v. Swarrow*, 72 F.3d 308, 310 n. 3, 20 BLR 2-76 (3d Cir. 1995). A physician who is "Board-certified" has received certification in radiology by the American Board of Radiology, or the American Osteopathic Association. 20 C.F.R. § 718.202(a)(1)(ii)(C). *See Staton v. Norfolk & Western Railway Co.*, 65 F.3d 55, 57, 19 BLR 2-271 (6th Cir. 1995). It is permissible to accord greater weight to physicians who hold both credentials. *Cranor v. Peabody Coal Co.*, 22 BLR 1-1 (1999) (*en banc* on Recon.); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). I may also consider, and give appropriate weight to, the academic teaching credentials of radiologists. *See Worhach v. Director, OWCP*, 17 BLR 1-105 (1993).

Exhibit No.	X-Ray Date	Reading Date	Physician/Credentials	Diagnosis/Comment
DX-69	10/29/99	10/29/99	Ciotola, B/BCR	0/0
EX-2	10/29/99	01/21/00	Wheeler, B/BCR[8]	0/0
EX-2	10/29/99	01/21/00	Scott, B/BCR[9]	0/0
CX-8	10/29/99	08/10/00	Miller, B/BCR[10]	1/0
CX-9	10/29/99	08/14/00	Cappiello, B/BCR[11]	1/1
DX-58	09/08/99	09/09/99	Ciotola, B/BCR	0/0
DX-59	09/08/99	09/16/99	Barrett, B/BCR	0/0
EX-1	09/08/99	12/27/99	Scott, B/BCR	0/0
EX-1	09/08/99	12/28/99	Wheeler, B/BCR	0/0
CX-6	09/08/99	08/10/00	Miller, B/BCR	1/0
CX-7	09/08/99	08/14/00	Cappiello, B/BCR	1/1
DX-49	10/30/98	10/30/98	Levinson, A	0/0
DX-49	10/30/98	03/10/99	Scott, B/BCR	0/0
DX-49	10/30/98	03/10/99	Wheeler, B/BCR	0/0

[8] Dr. Wheeler has been an Associate Professor of Radiology at the Johns Hopkins University since 1974. Prior to that time he had been an Assistant Professor of Radiology from 1969, and an Instructor in Radiology from 1968 to 1969. DX-49; EX-5.

[9] Dr. Scott has been an Associate Professor of Radiology at the Johns Hopkins University since 1986. Prior to that time he had been an Assistant Professor of Radiology from 1978 until 1986. DX-49; EX-5.

[10] Dr. Miller is an Assistant Clinical Professor of Radiology at the College of Physicians and Surgeons of Columbia University. DX-48.

[11] Dr. Enrico J. Capiello served as an Assistant Professor in Radiology at the Albert Einstein College of Medicine from 1976 to 1980 and from 1982 until 1984. DX-48.

DX-48	10/30/98	05/06/99	Miller, B/BCR	1/0
DX-48	10/30/98	05/12/99	Ahmed, B/BCR	1/1
DX-51	09/20/96	01/27/97	Duncan, B/BCR	0/0
DX-51	09/20/96	01/28/97	Laucks, B/BCR	0/0
DX-48	09/20/96	05/06/99	Miller, B/BCR	1/1
DX-48	09/20/96	05/12/99	Ahmed, B/BCR	1/1
DX-6,9	07/01/96	07/01/96	Conrad, BCR	1/1
DX-6,8	07/01/96	07/18/96	Barrett, B/BCR	0/0
DX-17	07/01/96	10/17/96	Wheeler, B/BCR	0/0
DX-17	07/01/96	10/17/96	Scott, B/BCR	0/0
DX-48	07/01/96	05/06/99	Miller, B/BCR	1/1
DX-48	07/01/96	05/12/99	Ahmed, B/BCR	1/1
DX-20	06/25/90	06/25/90	Connolly, BCR	0/0
DX-20	06/25/90	07/23/90	Cole, B/BCR	0/0
DX-48	06/25/90	05/06/99	Miller, B/BCR	1/1
DX-48	06/25/90	05/18/99	Cappiello, B/BCR	1/1

Medical Evidence: Biopsy and Presumptions

Claimant cannot demonstrate pneumoconiosis at Section 718.202(a)(2), because the record contains no evidence which satisfies his burden of proof at this provision. Claimant is likewise precluded from employing the presumptions accorded under Section 718.202(a)(3), because there is no evidence of complicated pneumoconiosis, and Sections 718.305 and 718.306 are foreclosed because this claim was filed after January 1, 1982.

Medical Evidence: Medical Opinions

Pursuant to Section 718.202(a)(4), Claimant can demonstrate the existence of pneumoconiosis on the basis of medical opinion evidence. 20 C.F.R. § 718.202(a)(4). A determination of the existence of pneumoconiosis may be made, notwithstanding a negative x-ray, if a physician, exercising sound medical judgment finds that the miner suffers from pneumoconiosis as defined in 20 C.F.R. § 718.201. Any such finding shall be based on objective medical evidence, such as arterial blood gas tests, physical performance tests, physical examination, and medical and work histories. Such a finding shall be supported by a reasoned medical opinion.

Dr. Ahluwalia

Claimant was examined on September 26, 1996, by Dr. Harwinder S. Ahluwalia. DX-6. Dr. Ahluwalia administered the usual clinical tests, including a graded exercise test, arterial blood gas study and ventilatory test, *see* DXs-5, 7, and conducted a physical examination. He recorded a work history of 20 years of coal mine employment. Claimant complained of wheezing, dyspnea going uphill and walking two blocks and a productive cough. Mr. Futchko told Dr. Ahluwalia that he never smoked. On physical examination of Claimant's extremities, Dr. Ahluwalia found no clubbing, edema or varicosities. Claimant's thorax and lungs exhibited normal results on inspection, palpation and percussion. Dr. Ahluwalia concluded that this was a "normal physical exam" and assessed the impairment as "none on PFT's[.]" *Id*. He is board-eligible in internal medicine. *Id*.

Dr. Kraynak

Dr. Raymond J. Kraynak, D.O., is Claimant's treating physician. On July 29, 1998, he submitted a letter report briefly outlining the results of a ventilatory study from July 14, 1998. Citing the results, Dr. Kraynak opined that Claimant "has had a worsening of his condition." DX-34.

On June 17, 1997, Dr. Kraynak submitted a detailed report of his care of Claimant since April 16, 1997. CX-2. He recorded complaints of shortness of breath, a productive cough and exertional dyspnea. Mr. Futchko represented that he worked for 24 years in the mines, having left that work in 1997. Dr. Kraynak administered a pulmonary function test on April 16th, and reviewed a chest x-ray that had been interpreted as positive by Dr. H. K. Smith. Dr. Kraynak described on physical examination "a 68 year old white male who looks older than his stated age." An examination of the chest revealed a "[m]ild increase in A-P diameter. Scattered wheezes in all lung fields. No rales or rhonchi auscultated." Dr. Kraynak detected "slightly cyanotic" lips. CX-2.

Dr. Kraynak concluded that

> Mr. Futchko's history of having worked in the anthracite coal industry in excess of 10 years, the complaints which he has presented, my physical examination and the diagnostic studies performed, it is my opinion that he is totally and permanently disabled, due to coal worker's pneumoconiosis contracted during his employment in the anthracite coal industry. He is unable to lift or carry, climb

steps or walk for any period of time. He must be able to sit, stand and lay down, at his leisure, secondary to his severe respiratory impairment.

CX-2. He reiterated these conclusions in deposition testimony recorded on July 18, 1997. CX-1 at 18-19. Dr. Kraynak is board-eligible in family medicine and is a graduate of the Philadelphia College of Osteopathic Medicine. CX-16.

Dr. Levinson

Claimant was examined twice by Dr. Sander J. Levinson, M.D. On November 4, 1996, Dr. Levinson reported on his examination of Claimant on September 20, 1996. DX-51 [EX-14]; DX-57. Dr. Levinson recorded a primary complaint of difficulty breathing, noted shortness of breath, dyspnea on exertion after walking ½ block or walking up to 10 steps. Mr. Futchko also said he had a productive cough every morning. Claimant denied any cardiac problems, except for recalling a childhood heart murmur.

Dr. Levinson noted a coal mine employment history of 15 to 20 years as a truck driver, and also wrote that Claimant's last coal mine employment required him to lift up to 100 pounds and carry blasting powder. In addition, Claimant had worked on highway construction projects when he was not employed in the mines, "doing blasting and work[ing] under very dusty conditions[.]" Claimant did not smoke. *Id*. A physical examination of Claimant revealed no cyanosis, edema or clubbing. Claimant's chest was clear to percussion and auscultation. He reviewed the results of an EKG, negative x-ray, ventilatory test that had been performed with fair effort, and prior records.

According to Dr. Levinson, there was no evidence of any form of industrial pulmonary disease; the examination being negative for coal workers' pneumoconiosis. He concluded that Claimant did not "suffer[] from a pulmonary impairment from any cause and from a pulmonary standpoint I feel he would have the residual capacities to perform work similar to his prior work in the anthracite industry." Dr. Levinson did find evidence of a cardiac murmur suggestive of an underlying valvular disease with aortic stenosis. *Id*. Dr. Levinson is board-certified in internal medicine, with a subspecialty in pulmonary disease. EX-6.

Dr. Levinson's second report, dated January 20, 1999, provides conclusions and findings based on a physical examination of Mr. Futchko on October 30, 1998. DX-49 [EX-6]. He recorded similar complaints, including shortness of breath and dyspnea after walking one block and climbing seven steps. Mr. Futchko told Dr. Levinson that he was being treated by Dr. Kraynak for pulmonary problems. Claimant's occupational history was reported as 24 years in coal mining and seven years in highway construction. *Id*.

Dr. Levinson found on physical examination no cyanosis of the lips or extremities, edema or clubbing. Again, Claimant's chest was clear to percussion and auscultation. An EKG, ventilatory

examination performed with "only poor effort," chest x-ray and an arterial blood gas test were administered. The exercise blood gas study "revealed a minor degree of hypoxemia at rest with an excellent response to exercise, indicating that there is no oxygenation limitation to exercise." He reiterated the conclusions, that had been reached after the previous examination, that Claimant does not suffer from any industrial pulmonary impairment from any cause and "from a pulmonary standpoint alone he would appear to have the residual capacities to perform work similar to his work in the anthracite industry." Claimant did show evidence of a heart murmur and hypertension. *Id*.

Employer submitted Dr. Levinson's testimony from an April 1, 1999 deposition. DX-49 [EX-7]. Dr. Levinson testified that Claimant recalled that his last work required him to carry up to 40 pounds. *Id*. at 12. Concerning his findings on physical examination, Dr. Levinson explained that cyanosis could indicate low oxygen content of the blood and clubbing could be found in cases of pulmonary disease. *Id*. at 16-17. He also recalled that he attempted to administer pulmonary function testing, but that this test was performed with poor effort. The arterial blood gas testing demonstrated "perfectly normal oxygenation at exercise." *Id*. at 20. He also reviewed the results of tests administered by Dr. Kraynak.

Dr. Levinson repeated his conclusion that Claimant did not suffer from any form of coal workers' pneumoconiosis. Instead, he concluded that Claimant does suffer from "certain cardiovascular conditions" that were unrelated to Mr. Futchko's coal mine employment. *Id*. at 24. Dr. Levinson also opined that Claimant was not totally disabled from a pulmonary standpoint, and that from a respiratory standpoint Claimant could resume his previous coal mine employment, even assuming that Mr. Futchko had acquired simple pneumoconiosis. *Id*. at 26. The doctor further testified that there was no substantial difference in Claimant's chest and lung examinations in the interval between his initial examination of Claimant and the 1998 examination except for an increase in Mr. Futchko's blood pressure. His pulmonary condition had not worsened. *Id*. at 30.

Dr. Levinson was vigorously cross-examined concerning the clinical testing of record, especially Claimant's performance on pulmonary function testing and the PO2 value from a recent arterial blood gas test that showed a lowered value at rest; a value lower than those recorded in a previous test. *Id*. at 33-36. He also testified on cross that, in his opinion, Claimant's "uncontrolled hypertension and significant hypertensive cardiovascular disease" would prevent him from returning to the mines. *Id*. at 37. On redirect examination, Dr. Levinson explained that the depressed arterial blood gas result is explained by clear evidence of Mr. Futchko's hypertension. He also suggested that even a pulmonary function test that was not valid could prove useful. *Id*. at 39-41.

Dr. Corazza

Claimant was examined at the request of the Department of Labor by Dr. Leo J. Corazza, M.D. on September 8, 1999. DX-63. Dr. Corazza recorded a coal mine history of 20 years, reviewed a medical history, administered clinical tests and conducted a physical examination. He noted complaints of wheezing and a frequent cough. The examination revealed no "color," edema or clubbing. On physical

examination, the thorax and lungs demonstrated full and equal expansion, no rales or wheezes, and percussion showed that the lungs were "resonant throughout." For a cardiopulmonary diagnosis, Dr. Corazza concluded that Claimant suffers from "1. Hypertensive cardiovascular disease. 2. Arteriosclerotic heart disease. 3. Deviated nasal septum ... ." *Id*.

In a follow-up letter to Claimant's physician, Dr. Heffner, Dr. Corazza reported that "at the time of the examination [Mr. Futchko] complained of symptoms of chest pain on exertion with prompt rest relief." He continued that the "physical examination was not remarkable except for blood pressures ... ." *Id*.

Dr. Dittman

Claimant was examined by Dr. Thomas H. Dittman, M.D., on October 29, 1999. Dr. Dittman issued his report on this procedure on November 11, 1999. DX-70. Claimant's chief complaint was shortness of breath since 1993 with gradually worsening symptoms. Mr. Futchko said he suffered from dyspnea after walking one block on level ground or climbing 10 steps. He complained to Dr. Dittman that he also had experienced a productive cough over the previous five years.

Dr. Dittman recorded a detailed employment history, with Claimant's coal mining ending in 1987. On physical examination, Claimant's lungs were found to be "[n]ormal to inspection; normal to palpation. Clear to percussion. No wheezes, rhonchi, rales or rub." Dr. Dittman observed that Claimant "makes a poor inspiratory effort when asked to take a deep breath to auscultate." Dr. Dittman administered a ventilatory test and a resting arterial blood gas study, which revealed mild hypoxemia. An exercise regimen for this test was considered to be contraindicated. The pulmonary function test was performed with less than maximum effort. *Id*.

Dr. Dittman concluded that "Mr. Futchko does not have coalworker's pneumoconiosis and is not physically impaired nor disabled on the basis of coalworker's pneumoconiosis." He explained that, instead, Claimant suffers from aortic stenosis, which contributes to Claimant's symptoms of dyspnea, and "possible hypertension." *Id*.

On July 24, 2000, Dr. Dittman submitted a medical report based on his review of Claimant's medical file. EX-3. These files included documents from Claimant's hospitalization for chest pain at the Pottsville Hospital in December, 1992. Dr. Dittman stated that the Discharge Summary indicated that the lungs were clear. Dr. Dittman noted a subsequent hospitalization, also for chest pain. Lungs were clear on physical examination. Claimant was again treated at Pottsville Hospital in the "Short Procedure Unit" on January 12, 1994, with a principal diagnosis of "senile cataract." A pre-operative anesthesia evaluation noted clear lungs, and did not indicate any respiratory problem, according to Dr. Dittman. Similar negative results were displayed in records from subsequent Pottsville treatments. Chest x-rays during these admissions showed small granulomas.

Dr. Dittman noted the results of a stress echocardiogram that was administered on October 11, 1999. The test report indicated that a pre-exercise physical examination showed clear lungs. While the procedure was limited due to fatigue and shortness of breath, the report further noted that Claimant "exhibited above average exercise tolerance for his age." *Id*.

Dr. Dittman concluded his review by stating that it

> does not in any way change my opinion regarding Mr. Futchko's condition. There is no mention in the medical records of any coalworkers' pneumoconiosis or any other type of lung disease. There is no mention of the patient being on any medications for any lung disease. His lungs are invariably described as being clear. Several chest x-rays were performed and none of these x-rays revealed findings of pneumoconiosis. ...
>
> It remains my opinion that he does not have coalworker's pneumoconiosis and is not physically impaired nor disabled on the basis of coalworker's pneumoconiosis.

EX-3.

Dr. Heffner

Employer also introduced medical records from Dr. G. W. Heffner, M.D., who has been a treating physician. EX-4. Claimant first saw Dr. Heffner complaining of a severe headache. Office notes from November 1, 1999, showed clear lungs on examination. Similar findings were recorded on September 28, 1999, when Dr. Heffner wrote that "Mr. Futchko is applying for Black Lung benefits ... [he] denies any chest discomfort with exertion. He does not really complain too much about anything ... [but gets] some dyspnea on exertion." Dr. Heffner's impression on this date was "[q]uestionable C.A.D. vs. shortness of breath secondary to Black Lung or other factors."

Dr. Heffner administered a stress echocardiogram on October 11, 1999, after reported indications of "[d]yspnea on exertion [and an a] bnormal [EKG]." His test summary indicated, *inter alia*, "clear lung fields post-exercise." The test had been stopped due to fatigue and shortness of breath, but Dr. Heffner still noted that Claimant "exhibited above average exercise tolerance for his age." EX-4.

Pulmonary Function Studies

In order to demonstrate total respiratory disability on the basis of pulmonary function study evidence, a claimant may provide studies, which, accounting for sex, age, and height, produce a qualifying value for the FEV1 test, plus either a qualifying value for the FVC test, or the MVV test, or a value of FEV1 divided by the FVC less than or equal to 55 percent. "Qualifying values" for the FEV1, FVC and the MVV tests are measured results less than or equal to the values listed in the appropriate tables of Appendix B to 20 C.F.R. Part 718. *See Director, OWCP v. Siwiec*, 894 F.2d 635, 637 n. 5, 13 BLR

2-259 (3d Cir. 1990). Assessment of the pulmonary function study results is dependent on the Claimant's height, which has been recorded between 62 and 64 inches. Considering this discrepancy, I find that Claimant's height is 63 inches for purposes of evaluating the pulmonary function studies. *See Protopappas v. Director, OWCP*, 6 BLR 1-221 (1983).

The duplicate claim record contains the following pulmonary function studies:

Ex. No.	**Date**	**Age**	**HT.**	**FEV_1**	**FVC**	**MVV**	**FEV_1/FVC**	**Qualify**
DX-5	09-26-96	67	64"	2.50	2.93	66	87.51%	No

Claimant's cooperation in the performance of this test was listed as "fair," and his comprehension "good." Dr. Ahluwalia noted that this study was a "[n]ormal spirometry of his age [and that t]here is variation in the effor[t]."

Dr. Kraynak criticized this study, citing frequent breaks and gross variability in the tracings. CX-1 at 16-17.

Ex. No.	**Date**	**Age**	**HT.**	**FEV_1**	**FVC**	**MVV**	**FEV_1/FVC**	**Qualify**
CX-11	04-16-97	68	63"	1.30	1.91	50	69%	Yes

Dr. Kraynak observed "good" effort, cooperation and comprehension in the performance of this study. Based on its results, he diagnosed a "severe restrictive defect."

Dr. Kaplan reviewed this study on May 7, 1997, and concluded that it was "not suitable for interpretation." DXs-51[EX-10], 57. He reviewed the tracings, and found that they contradicted the test notations that Claimant's effort and cooperation were "good." He explained that none of the FEV tracings demonstrated that the expiratory efforts were of sufficient duration. *Id*.

On July 3, 1997, Dr. Kraynak disputed Dr. Kaplan's invalidation, vigorously asserting that Claimant completed the protocol with good effort. He further elaborated that

> Dr. Kaplan's glaring lack of knowledge, as it come to the evaluation of pulmonary function studies, in spite of his purported credentials, is found in his statements that the tracings are not of sufficient duration i.e., six seconds minimum. The regulations clearly state that the tracings are to continue for at least **five** seconds, or until a respiratory plateau has been reached.

CX-3. He also asserted in deposition testimony that this test was performed with good effort. CX-1 at 13-15.

Dr. Levinson likewise found this study to be invalid. He explained in his May 12, 1997 review that the entire FVC tracings had not been displayed, and, utilizing a "back extrapolation of time zero," opined

that exhalation preceded the zero point, resulting in underestimated results. Dr. Levinson also concluded that the MVV curves indicated a variable and inconsistent effort, and that, accordingly, a maximal effort for the required 12 to 15 seconds was not achieved. He concluded that the test was not accurate. DXs-51[EX-11], 57.

Dr. John P. Simelaro, D.O., reviewed this test on April 29, 1997, and judged it acceptable. CXs-4, 5. Dr. Simelaro opined that the study exhibited a "mildly decreased" FVC, "minimally decreased FEV1%, and a "severely decreased" mid flow. He diagnosed "[m]ild to moderate obstructive airways disease. The MVV is also reduced and may represent an obstructive mechanism. The FVC is reduced and may represent restriction. Would suggest FRC to delineate." CX-4. Dr. Simelaro is board-certified in internal medicine and diseases of the chest. CX-10.

Claimant also obtained a review of this study from Dr. Michael A. Venditto, D.O. CX-5. In an undated report, Dr. Venditto also pronounced this study acceptable. He concluded that this test showed "moderately reduced" FVC and FEV1 results, a "normal" FEV1/FVC ration, and noticed that the "mid flow and peak flow are reduced." Dr. Venditto further reported that "[t]here is no evidence of large airway obstruction. Small airways dysfunction is seen. There is a suggestion of a moderate restrictive process. An FRC determination is needed for definitive diagnosis." CX-5. Dr. Venditto is board-certified in internal medicine and diseases of the chest. CX-15.

Ex. No.	**Date**	**Age**	**HT.**	**FEV_1**	**FVC**	**MVV**	**FEV_1/FVC**	**Qualify**
CX-12	06-04-97	68	63"	0.71	1.29	32		Yes

Dr. Kraynak noted "good effort and cooperation." The test showed a "severe restrictive defect."

This study was invalidated by Dr. Robin L. Kaplan, M.D. According to his July 22, 1997 review, the tracings for this study revealed "inconsistent and submaximal effort" by Claimant. Dr. Kaplan averred that none of the tracings was of sufficient duration. He found "excessive variation between the three individual forced expiratory efforts." DX-51[EX-8].

Ex. No.	**Date**	**Age**	**HT.**	**FEV_1**	**FVC**	**MVV**	**FEV_1/FVC**	**Qualify**
CX-13	06-05-97	68	62.5"	0.65	0.76	40.91	86%	Yes

This test was administered at the William H. Ressler center. "Fair cooperation & comprehension" were observed by the technician. Dr. Kraynak interpreted this study as showing a "severe restrictive defect."

Dr. Kaplan invalidated this pulmonary function study, presenting his conclusions in his July 22, 1997 report. DX-51[EX-8]. Concerning the results of this test and those of the June 4th study [CX-12], Dr. Kaplan observed that

> [i]t is interesting to note the comments and the interpretations of these [June 4th and 5th] tests. Although the tests are not valid ..., it is curious that the interpretations rendered for both tests were the same, even though the results differ. If the test dated 6/4/97 were suitable for interpretation, the physiologic abnormality present would be an obstructive defect, not a restrictive one, since the FEV1.0/FVC ratio is less than 60%. The same interpretation was applied to the results of the test dated 6/5/97, in which the FEV1.0/FVC ratio is ostensibly 80%. The conventions of pulmonary function interpretation clearly establish guidelines for diagnosing obstructive and restrictive pathophysiology. These conventions appear to have been disregarded in the interpretation of these test results.

DX-51[EX-8]. Dr. Kaplan is board-certified in internal medicine, pulmonary medicine, and critical care medicine.

Ex. No.	**Date**	**Age**	**HT.**	**FEV_1**	**FVC**	**MVV**	**FEV_1/FVC**	**Qualify**
DX-30	07-14-98	69	63"	0.24	0.66	16	37%	Yes

Dr. Kraynak pronounced Claimant's cooperation and comprehension "good," and interpreted the results as demonstrating a "severe restrictive defect." Claimant was very short of breath in performing this study. DX-30.

Dr. Refik Sahillioglu reviewed the tracings from this study, and concluded in an August 24, 1998 consultation review that this test was unacceptable. He stated that the trials showed less than optimal effort and improper performance, and explained that the tracings exhibited "no demonstration of inspiratory effort[,] poor effort and inconsistency FVC and MVV[.]" Dr. Sahillioglu further reported that the "restrictive defect need be verified by TLC determination." DX-32. Dr. Sahillioglu is board-eligible in internal medicine and pulmonary diseases. DX-33.

In a December 8, 1998 narrative report, Dr. Levinson presented the results of his review of this study. DXs-39, 49 [EX-5]. He considered the study invalid based on his examination of the tracings. He first criticized the test because the "entire forced vital capacity curves have not been displayed." Dr. Levinson also found "clear evidence of exhalation before the zero point[,]" an aberration which skewed the FEV1 and FVC results. According to Dr. Levinson, Claimant hesitated during the course of the FVC maneuver and the MVV tracings demonstrated variable and inconsistent effort for only 10 seconds. Dr. Levinson also compared this test with a study that had been conducted by him on October 30, 1998. That test, despite poor effort on Claimant's part, still yielded much higher values than those achieved on Dr. Kraynak's test, further evidence that the "study [administered] by Dr. Kraynak is meaningless and adds no valuable information regarding the true and complete pulmonary capacities of Mr. Futchko." *Id*.

Dr. Jonathan Hertz, M.D. submitted a review of a "7/15/98" pulmonary function study.[12] DX-49 [EX-4]. Dr. Hertz found "unsatisfactory" patient effort with "great wavering and fluctuation in the tracing[,]" and "unacceptable variability in the FEV1 on the 3 efforts." He concluded in his December 22, 1998 report that "[t]his test cannot be interpreted reliably, and it cannot be considered indicative of the patient's pulmonary reserve under Part 718 Regulations." *Id*.

On February 2, 1999, Dr. Kraynak authored a rebuttal to the invalidation report from Dr. Hertz, disagreeing that there was excessive variability between the two largest FEV1 trials. He noted that Dr. Hertz had not criticized the MVV results, which to Dr. Kraynak were "severely reduced" and exhibited severe disability. DX-43. He disagreed with Dr. Levinson's review by stating in a January 21, 1999 rebuttal his disagreement with the former's view that the commencement of exhalation is not clearly delineated, that there was hesitation and variable effort during the protocol. Dr. Kraynak also disputed Dr. Levinson's opinion that the MVV curves are variable and that this trial was performed inconsistently for fewer than 12 seconds. In the end, according to Dr. Kraynak, Dr. Levinson's invalidation "is more than meaningless." DX-43.

Dr. Kraynak was moved again to respond to Dr. Levinson's invalidation report, this time in a February 15, 1999. "[A]s usual," he wrote, "Dr. Levinson ... does not give us in any way, shape, or form any of his alleged evidence[,]" the letter continues. Dr. Kraynak insisted that there was no hesitancy in the performance of the test and deemed the qualifying study "valid." DX-48.

Ex. No.	**Date**	**Age**	**HT.**	**FEV_1**	**FVC**	**MVV**	**FEV_1/FVC**	**Qualify**
DX-49 [EX-6]	10-30-98	69	63"	1.44	2.04	41	71%	No
	(post-bronchodilator)			1.39	1.76	38	79%	No

Dr. Levinson considered the patient effort in the performance of this study to be "poor."

Ex. No.	**Date**	**Age**	**HT.**	**FEV_1**	**FVC**	**MVV**	**FEV_1/FVC**	**Qualify**
DX-48	04-21-99	70	62"	0.89	1.19	24	75%	Yes

Dr. Matthew J. Kraynak administered this study and noted that Claimant's effort, cooperation and comprehension were "good." To him, the test revealed a "severe restrictive defect." DX-48.

Dr. Kaplan deemed this test invalid in a review dated April 5, 2001. EX-7. According to Dr. Kaplan, Claimant's inconsistent effort was demonstrated by excessive variation in FEV1 trials, and the "actual MVV is substantially less than the expected MVV results." He opined that this test was not suitable for interpretation.

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[12] I find that this report refers to the study administered by Dr. Kraynak on July *14*, 1998. Dr. Kraynak issued a rebuttal of Dr. Hertz's review of his test. *See* DX-43.

Ex. No.	Date	Age	HT.	FEV_1	FVC	MVV	FEV_1/FVC	Qualify
DX-61	09-08-99	70	63'	2535cc	2865cc	53		No

Dr. Leo Corazza administered this test as part of a pulmonary examination. He found that Claimant's comprehension and cooperation were "good." He continued that the "cause of the markedly decreased MVV is not apparent. The values are within normal limits."

Ex. No.	Date	Age	HT.	FEV_1	FVC	MVV	FEV_1/FVC	Qualify
DX-70	10-29-99	70	64"	1.06	2.32	32.46	46%	Yes
	(post bronchodilator)			0.75	1.61	51.71	47%	Yes

The computer interpretation of this study was that Claimant exhibited "fair patient cooperation and effort" on the MVV trials, "inconsistent effort" on the FVC procedures, and "fair" to "good" cooperation and effort on the FRC/SVC protocol. In handwritten notes to this test, Dr. Dittman observed from reviewing the tracings that Claimant's "[e]ffort in testing is inconsistent and less than maximum. This reduces the reliability of the testing for accurate determination of actual lung function." He further noted that the values produced would suggest a "moderate obstructive effort [defect?], but reduced effort has falsely lowered results." DX-70.

Ex. No.	Date	Age	HT.	FEV_1	FVC	MVV	FEV_1/FVC	Qualify
CX-14	03-02-00	70	63"	0.69	1.57	29		Yes

A technician commented that this test was performed with good effort and cooperation. Dr. Kraynak interpreted the results as indicative of a "severe restrictive defect."

Dr. Levinson reviewed this study on April 4, 2001, and pronounced it invalid due to improper performance. EX-6. There was "marked irregularity in the shape of the [FVC] curves" indicative of less than maximal effort. The MVV curves also showed that Claimant appeared to stop breathing for a "period of at least 8 to 10 seconds."

Arterial Blood Gas Tests

Ex. No.	Date	Physician	Alt.	pCO2	pO2	Qualify
DX-7	09-26-96	Ahluwalia		40	89	No
	(exercise)			42	86	No

Ex. No.	Date	Physician	Alt.	pCO2	pO2	Qualify
DX-49[EX-6]	10/30/98	Levinson		39.2	67.2	No
	(exercise)			37	96.3	No

Dr. Levinson reported that the "[a]cid base studies are within satisfactory limits." He concluded that the test did show a "minor degree of hypoxemia at rest with an excellent response to exercise indicating that there is no oxygenation limitation to exercise."

Ex. No.	Date	Physician	Alt.	pCO2	pO2	Qualify
DX-49[EX-7]	09/20/96	Levinson		41	78.6	No
	(exercise)			43.3	83.2	No

This study indicated to Dr. Levinson "normal oxygenation at rest with an excellent response to exercise."

Ex. No.	Date	Physician	Alt.	pCO2	pO2	Qualify
DX-62	09-08-99	Corazza	<2999'	41	80	No

Dr. Corazza observed that an exercise trial was not performed because of chest pain. The study was deemed to be "within normal limits."

Ex. No.	Date	Physician	Alt.	pCO2	pO2	Qualify
DX-70	10-29-99	Dittman	43	69	No	

Dr. Dittman noted "mild arterial hypoxemia. Acid base is normal."

Discussion

Pneumoconiosis

Section 718.202(a) sets forth four distinct methods relevant to demonstrating the existence of pneumoconiosis. In order to determine whether Claimant has established the presence of the disease, however, I must weigh all relevant evidence together to find whether Claimant has proven the existence of pneumoconiosis at 20 C.F.R. § 718.202(a). *See Penn Allegheny Coal Co. v. Williams*, 114 F.3d 22, 25, 21 BLR 2-104 (3d Cir. 1997); *accord Island Creek Coal Co. v. Compton*, 211 F.3d 203, 208-09, 211 (4th Cir. 2000).

I find that Claimant has not demonstrated the existence of pneumoconiosis at Section 718.202(a)(1). Of the five x-rays taken in connection with the duplicate claim, *viz*. after the denial of the first claim, the films taken on October 29, 1999, September 8, 1999, October 30, 1998 and July 1, 1996 are negative for pneumoconiosis. First, the readings at most are in equipoise, and Claimant has not carried his burden of persuasion. More importantly, I will credit the negative interpretations of these films by Drs. Scott and Wheeler. Although Claimant's radiologists are dually qualified as board-certified B-readers, and some possess academic credentials, Drs. Scott and Wheeler have similar, official, radiological qualifications and possess extensive long-term academic experience as professors at Johns Hopkins. *See Worhach*.

Upon careful evaluation of the medical opinion evidence, I also find that Claimant has failed to demonstrate pneumoconiosis at Section 718.202(a)(4). First, I will credit the opinions of Dr. Levinson, who did not find pneumoconiosis and concluded that Claimant does not suffer from this disease, over the contrary opinion of Dr. Kraynak, on the basis of his superior credentials. Dr. Kraynak is board-eligible in family medicine, Dr. Levinson is board-certified in internal medicine with a subspecialty in pulmonary medicine. *See Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *see also Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269 (4th Cir. 1997). Dr. Levinson's reports are also more thorough and supported by more extensive documentation. *See Lango v. Director, OWCP*, 104 F.3d 573, 21 BLR 2-12 (3d Cir. 1997).

Second, regardless of credentials, Dr. Levinson's opinions are corroborated by those of Drs. Ahluwalia, Corazza and Dittman.[13] Their findings and conclusions sufficiently undermine Dr. Kraynak's evidence. For example, unlike Dr. Kraynak, these physicians largely conducted normal physical examinations and accounted for an array of clinical tests which they interpreted as essentially normal. Given Claimant's burden of proof, *see Greenwich Collieries v. Director, OWCP*, 990 F.2d 730, 737, 17 BLR 2-64 (3d Cir. 1993), *aff'd* 512 U.S. 267 (1994)[*Ondecko*]; *Cole v. East Kentucky Collieries*, 20 BLR 1-50 (1996), I find that Dr. Kraynak's diagnoses of coal workers' pneumoconiosis are not persuasive evidence of either clinical pneumoconiosis or any pulmonary or respiratory impairment significantly related to, or substantially aggravated by, Claimant's coal mine dust exposure.[14]

Finally, all relevant evidence must be considered for the determination whether Claimant has establish the existence of pneumoconiosis. *Williams.* After careful consideration of the duplicate claim record, I find that Claimant has failed to prove that he has acquired coal workers' pneumoconiosis in any form. As stated above, neither the x-ray nor medical opinion evidence has demonstrated the presence of this disease. Similarly, this evidence taken together, when evaluated in concert and with the added

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[13] I note that Dr. Dittman's testing detected mild hypoxemia and a moderate obstructive defect. It is also not entirely clear that his opinion of no pneumoconiosis is based on negative x-rays alone. To the extent his conclusions may be interpreted as ruling out only *clinical*, as opposed to legal, pneumoconiosis, his report will be assigned limited weight. I note, however, that Dr. Dittman observes that the medical records he reviewed demonstrate no lung disease of any nature. *See* EX-3.

[14] I have accorded due regard to Dr. Kraynak's status as Claimant's treating physician. *See Mancia v. Director, OWCP*, 130 F.3d 579, 21 BLR 2-114 (3d Cir. 1997). But the reports and conflicting opinions of record are uniformly extensively documented and reasoned, *see Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441, 21 BLR 2-269 (4th Cir. 1997); *see generally Peabody Coal Co. v. McCandless*, __ F.3d __, 2001 U.S.App. LEXIS 14386 (7th Cir. June 29, 2001), and carry more weight in the context of the record as a whole.

consideration of clinical testing,[15] does not support a finding of pneumoconiosis.

Total Respiratory Disability

Claimant may also prove a material change by proving that he suffers from total respiratory disability. *See Beatty v. Danri Corp.*, 49 F.3d 993, 19 BLR 2-136 (3d Cir. 1995). The determination of the existence of a totally disabling respiratory or pulmonary impairment shall be made under the provisions of Section 718.204. A claimant shall be considered totally disabled if he is prevented from performing his usual coal mine work or comparable and gainful work. I must weigh all of the relevant probative evidence which meets one of the four standards applicable to living miners under Section 718.204(c). *See Fields v. Island Creek Coal Co.*, 10 BLR 1-19 (1987); *Shedlock v. Bethlehem Mines Corp.*, 9 BLR 1-195 (1986). In the absence of contrary probative evidence, evidence which meets one of the Section 718.204(c) standards shall establish total disability. *See Bosco v. Twin Pines Coal Co.*, 892 F.2d 1473, 1479-80, 13 BLR 2-196 (10th Cir. 1989).

Given the progressive nature of pneumoconiosis, *see Eastern Associated Coal Corporation v. Director, OWCP*, 220 F.3d 250, 258 (4th Cir. 2000), the more recent evidence with respect to the nature and extent of Claimant's pulmonary or respiratory *disability* would be the more probative of his condition at the time of the hearing. *See Swarrow*, 72 F.3d 308 at 314, 20 BLR 2-76; *Milburn Colliery Co. v. Hicks*, 138 F.3d 524, 530, 21 BLR 2-269 (4th Cir. 1998); *Cooley v. Island Creek Coal Co.*, 845 F.2d 622, 624, 11 BLR 2-147 (6th Cir. 1988); *see also Wetzel v. Director, OWCP*, 8 BLR 1-139 (1985).

I must first determine whether Claimant has met the criteria of each subsection of Section 718.204(c). Initially, I find that Claimant has failed to demonstrate total respiratory disability on the basis of ventilatory study evidence at Section 718.204(c)(1). Although the record contains seven qualifying pulmonary functions studies: April 16, June 4 and June 5, 1997, CXs-11, 12, 13, July 14, 1998, DX-30, April 21, September 8 and October 29, 1999, DXs-48, 61, 70, and March 2, 2000, CX-14, I will credit the opinions of employer's experts who have reviewed these tests and are critical of their performance or accuracy.

The Secretary's regulations allow for the review of pulmonary function testing by experts who can review the ventilatory tracings and determine the validity of a particular test. 20 C.F.R. § 718.103 & Part 718, Appendix B; *Siwiec*; *see generally Ziegler Coal Co. v. Sieberg*, 839 F.2d 1280, 1283,11 BLR 2-80 (7th Cir. 1988). Thus, in assessing the probative value of a clinical study, an administrative law judge must address "valid contentions" raised by consultants who review such tests. *See Old Ben Coal Co. v. Battram*, 7 F.3d 1273, 1276, 18 BLR 2-42 (7th Cir. 1993); *Dotson v. Peabody Coal Co.*, 846 F.2d

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[15] Arterial blood gas and pulmonary function studies may not be explicit diagnostic tools for clinical pneumoconiosis, but their value as documentation is recognized by the Secretary's regulations. *See* 20 C.F.R. § 718.202(a)(4).

1134, 1137-38 (7th Cir. 1988); *Strako v. Ziegler Coal Co.*, 3 BLR 1-136 (1981); *see also Siegel v. Director, OWCP*, 8 BLR 1-156 (1985)(2-1 opinion with Brown, J., dissenting); *accord Winchester v. Director, OWCP*, 9 BLR 1-177(1986). The Third Circuit has emphasized that the administrative law judge "must determine whether the test results meet the quality standards and whether the medical evidence is reliable[.]" *Siwiec*, 894 F.2d at 638, 13 BLR 2-259.

Although the April 16, 1997 test was deemed acceptable by Drs. Kraynak, Simelaro and Venditto, I will accept Dr. Levinson's view that Claimant's effort was "variable and inconsistent" on the basis of his credentials. *See Martinez v. Clayton Coal Co.*, 10 BLR 1-24 (1987); *Dillon v. Peabody Coal Co.*, 11 BLR 1-113 (1988); *see generally Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989) (*en banc*). While Drs. Simelaro and Venditto possess similar qualifications, I accord their brief "validation" opinions less weight because they lack a persuasive explanation.[16] *Cf. Hicks*, 138 F.3d at 530, 21 BLR 2-269 ("check box" validation of arterial blood gas study unexplained).

I will also credit Dr. Kaplan's criticism of the June 4 and 5, 1997 tests on the basis of his credentials. Similarly, I will defer to the invalidation opinions of Drs. Sahillioglu, Levinson and Hertz, who deemed the July 14, 1998 test to be invalid, to Dr. Kaplan's invalidation of the April 21, 1999 study and Dr. Levinson's review of the March 2, 2000 study. *Martinez.*

Finally, I note that the test administered by Dr. Dittman on October 29, 1999 yielded qualifying results. DX-70. As noted above, Dr. Dittman observed that the values would suggest "moderate obstructive defect," but further indicated that "reduced effort has falsely lowered results." DX-70. I will credit this test as a qualifying study, but must account for Dr. Dittman's comments in assigning probative weight to this study.

As a result, there is a single qualifying pulmonary function study that has minimum reliability, according to Dr. Dittman, which is in substantial compliance with the Secretary's regulations. *See generally Siwiec*. This test, when weighed against the nearly contemporaneous non-qualifying study administered by Dr. Corazza, DX-61, does not establish that it is more likely than not that Claimant suffers from total respiratory disability at section 718.204(c)(1). *See Baker v. North American Coal Corp.*, 7 BLR 1-79, 1-80 (1984), and *Burich v. Jones & Laughlin Steel Corp.*, 6 BLR 1-1189, 1-1191 (1984),

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[16] Both Drs. Simelaro and Venditto employ identical language in their reviews:

> I have reviewed the pulmonary function study concerning Andrew Futchko dated 4/16/97. I have reviewed the actual tracings of this study and compared the tracings and values to the applicable regulations found in the "Code of Federal regulations," Appendix B, Section 718. After review of this study and a comparison with the regulations, I find this study is valid.

CXs-3, 5.

cited in *Andruscavage v. Director, OWCP*, No. 93-3291, slip op. at 10, 12 (3d Cir. Feb. 1, 1994)(unpub.).

In making this determination, I have carefully considered Dr. Kraynak's knowledge of the regulations and his vigorous rebuttal to the contrary reviews of the qualifying studies of record.

There is no qualifying arterial blood gas test in the duplicate claim record. Claimant has thus failed to demonstrate total disability at section 718.204(c)(2). A claimant may also demonstrate total disability with medical evidence of cor pulmonale with right-sided congestive heart failure in addition to pneumoconiosis. Because there is no evidence of cor pulmonale with right-sided congestive heart failure, I am unable to find that Claimant has demonstrated total disability at Section 718.204(c)(3). 20 C.F.R. § 718.204(c)(3); *see Newell v. Freeman United Coal Mining Co.*, 13 BLR 1-37 (1989), *rev'd on other grounds*, 933 F.2d 510, 15 BLR 2-124 (7th Cir. 1991).

I find that Claimant has not demonstrated total respiratory disability at section 718.204(c)(4) on the basis of medical opinion evidence. First, Dr. Kraynak's disability assessments are based in part on ventilatory studies which I have discounted as unreliable. *See Siwiec*.

Further, I will credit Dr. Levinson's assessment of no "pulmonary impairment from any cause" on the basis of his credentials, and the more extensive documentation in the record -- ventilatory and arterial blood gas studies and negative physical findings -- which supports this opinion. *See Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985). Dr. Levinson's assessment is supported by Dr. Corazza's finding of an unremarkable (except for blood pressure) physical examination, Dr. Dittman's conclusion that Claimant is not disabled on the basis of coalworkers' pneumoconiosis, Dr. Ahluwalia's characterization of Claimant's cardiopulmonary impairment as "none on PFT's" and Dr. Heffner's statement that Claimant, despite ceasing to perform a stress EKG because of fatigue and shortness of breath, still "exhibited above average exercise tolerance for his age."[17] In view of this contrary medical opinion evidence, I am not persuaded by Dr. Kraynak's opinion that Claimant suffers from a totally disabling pulmonary or respiratory impairment.

I am charged with evaluating all relevant evidence, including pertinent lay testimony, to determine whether Claimant has established total respiratory disability in his duplicate claim. *See Fields*; *see also Poole v. Freeman United Coal Mining Co.*, 897 F.2d 888, 894, 13 BLR 2-348 (7th Cir. 1990). Upon review of this evidence, I find that the medical opinions of Drs. Ahluwalia, Corazza, Dittman, Levinson, the observation of Dr. Heffner noted above, the invalidations of Claimant's ventilatory tests, and the non-

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[17] Although Dr. Dittman administered a qualifying pulmonary function test, *see* DX-70, he discounted the accuracy of the test. In any event, despite the test results, he could properly deem Claimant not totally disabled due to pneumoconiosis. It is the role of the medical expert to interpret the clinical test results. *See Schetroma v. Director, OWCP*, 18 BLR 1-19 (1993).

qualifying pulmonary function and arterial blood gas tests constitute contrary probative evidence which precludes a finding of total respiratory disability, from whatever cause, at Section 718.204(c). I have considered Claimant's testimony, in which he stated that he has breathing problems and uses an inhaler prescribed by Dr. Kraynak. TR-24-26.

I note that, even if Claimant was credited with valid ventilatory studies so as to prove disability at section 718.204(c)(1), the medical opinions and arterial blood gas study results would still preclude a finding of total respiratory disability based on all relevant evidence at section 718.204(c).

CONCLUSION

Accordingly, because Claimant has failed to prove either the existence of pneumoconiosis or total respiratory disability, he has not established a material change in conditions in this duplicate claim, and, as a result, the duplicate claim must be denied.[18] 20 C.F.R. § 725.309(d); *Swarrow*.

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[18] At this point, I further note that, even if Claimant had proven a material change in conditions, the record as a whole would not establish pneumoconiosis or total respiratory disability. Even with the addition of the June 25, 1990 x-ray, DXs-20, 48, which I find to be positive, I find that the x-rays as a whole still are not persuasive evidence of the disease, given the negative interpretations of four of the six films of record by exceptionally well-qualified radiologists. Similarly, the medical opinion of Dr. Cubler, who saw Claimant on June 25, 1990, DX-20, does not support Claimant's case. Dr. Cubler completed the "cardiopulmonary diagnosis" portion of the form report as follows: "emphysema - none[,] minimal obstructive lung disease [and] no evidence by chest x-ray of pneumoconiosis[.]" DX-20. The etiology of the above was listed as "none[.]" Dr. Cubler continued that there was "no degree of impairment due to pneumoconiosis[.]" *Id*. Certainly, obstructive lung disease may constitute pneumoconiosis under the Act, *see Kline v. Director, OWCP*, 877 F.2d 1175, 1178, 12 BLR 2-346 (3d Cir. 1989), provided it is proven to have been significantly related to or substantially aggravated by Claimant's coal mine dust exposure. *See Stiltner v. Island Creek Coal Co.*, 86 F.3d 337, 341, 20 BLR 2-246 (4th Cir. 1996); *see generally* 65 Fed. Reg. 79943 (Dec. 20, 2000) (citing cases). Because Dr. Cubler does not ascribe the obstructive lung disease to coal mine dust exposure from the 24-year coal mine work history, his opinion does not constitute a finding of coal workers' pneumoconiosis.

Dr. Cubler's failure to find a pulmonary or respiratory impairment further militates against an award based on the record as a whole because it supports the probative evidence that is contrary to a finding of total respiratory disability. Dr. Cubler administered a non-qualifying pulmonary function test on June 25, 1990, recording a FEV1 of 2.68, FVC of 3.21 and MVV of 96.6 with good cooperation and comprehension. He also had the benefit of pre-and post-exercise arterial blood gas trials which produced non-qualifying results on that same day. DX-20. I have accounted for Dr. Kraynak's criticism of this early non-qualifying test. Dr. Kraynak found frequent breaks in the tracings and said that the study showed "falsely elevated values." CX-1 at 16-17.

ORDER

The claim of ANDREW FUTCHKO for benefits under the Act is hereby DENIED.

A
Ainsworth H. Brown
Administrative Law Judge

Attorney Fees

The award of an attorney's fee under the Act is permitted only in cases in which Claimant is found to be entitled to benefits. Since benefits are not awarded in this case, the Act prohibits the charging of any fee to Claimant for services rendered to him in pursuit of this claim.

NOTICE OF APPEAL RIGHTS: Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this decision and order may appeal it to the Benefits Review Board within 30 days from the date of this decision and order, by filing a notice of appeal with the Benefits Review Board at P.O. Box 37601, Washington, DC 20013-7601. A copy of a notice of appeal must also be served on Donald S. Shire, Esq. Associate Solicitor for Black Lung Benefits. His address is Frances Perkins Building, Room N-2117, 200 Constitution Avenue, N.W., Washington, DC 20210.